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No. 07-1178

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IN THE

Supreme Court of the United States

JOEL HJORTNESS, a minor, by and through his Parents and Legal Guardians, ERIC HJORTNESS and GAIL HJORTNESS, ERIC HJORTNESS, and GAIL HJORTNESS,

Petitioners,

v.

NEENAH JOINT SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners have presented compelling reasons to grant the Petition, where the Seventh Circuit's Opinion affirming the District Court's vigorous analysis of the evidence does not conflict with a decision of this Court or a Court of Appeals, and where the very premise underlying the Petition – that the Seventh Circuit somehow sanctioned predetermination – is not accurate.

2. Whether Petitioners have presented compelling reasons to grant the Petition, where the Respondent did not seriously infringes upon the disabled student's parents' opportunity to participate in the formulation of the student's IEP such that the student was denied a free appropriate public education in that the school district provided the parents with ample opportunities to participate in the formulation of the IEP, including before, during and after the IEP meetings, but where the parents did not avail themselves of those opportunities and instead refused to participate in the formulation of the IEP and asserted that the only issue to be discussed was whether the Respondent will pay for the cost of educating the student at his private school.

2. Whether review by this Court of the issue presented by Petitioners would have any practical effect on this case, where the evidence fails to establish that Respondent predetermined the student's placement and where it was the parents' utter refusal to participate in the process, rather than Respondent's failure to allow them to participate, that created their lack of participation in the formulation of the IEP.

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STATEMENT OF THE CASE

This case does not involve a school district's refusal to allow meaningful participation by parents in a student's Individualized Education Program ("IEP"). Rather, as both the District Court and Seventh Circuit correctly found, this case involves parents who *refused* to participate in the formulation of the student's IEP. This case involves parents whose only concern was getting the Neenah Joint School District ("Neenah") to pay for the private tuition payments of their son who they had unilaterally enrolled in private school prior to the formulation of the IEP.

The Petition is based entirely on the premise that the Seventh Circuit found predetermination, that is, that Neenah determined before the IEP meeting what placement they would offer to Joel Hjortness ("Joel"). The Seventh Circuit's decision says nothing of the sort. The only reasonable reading of the decision shows the Seventh Circuit found no predetermination, since it rejected the two – and only two – reasons the Administrative Law Judge ("ALJ") found predetermination.

Accordingly, there is no split in the Circuits that is pertinent to the resolution of this case. There is no other Circuit Court that has found predetermination in facts similar to this case, where the IEP is substantively appropriate, where the student can be educated in the public school (which is the least restrictive environment), and where the parents utterly refused to participate in the formulation of the IEP other than to demand the school pay for the parents' chosen private placement.

Further, any conflict in the Circuits is immaterial to this case, since there was no predetermination. Petitioners' assertion that Neenah did not contest the ALJ's conclusion of predetermination is patently false. *See* Pet. at 3. Neenah has always contested that conclusion, which conclusion both the District Court and Seventh Circuit did not affirm.

A procedural violation of the Individuals with Disabilities Education Act ("IDEA") alone does not constitute a violation of IDEA. The procedural flaw must cause harm to the student by causing a loss of a free appropriate public education ("FAPE"). As the courts' below concluded, since the parents refused to participate in the process other than to demand placement at their private school of choice, Neenah did nothing to interfere with their meaningful participation in the formulation of Joel's IEP. Neenah was not required to consider placement at SSOS, having concluded that Joel could be educated in the public school, which conclusion Petitioners do not challenge in their Petition.

This Court's intervention in this case will do nothing to further educational policy in this nation. The facts of this case support the lower courts' determinations that there was no predetermination in this case, and therefore there was no procedural violation of the magnitude that resulted in denying Joel FAPE.

A. FACTUAL BACKGROUND

Joel Hjortness attended public school at Shattuck Middle School in Neenah, his resident school district, until May of 2003 when his parents unilaterally withdrawn him. Pet. App. at 38a. Joel's parents, Eric and Gail Hjortness ("the parents"), enrolled Joel in a private school, first at the Kennan Academy in Menasha, Wisconsin until January of 2004, and thereafter as a residential student at the Sonia Shankman Orthogenic School ("SSOS") in Chicago, Illinois. *Id.* at 38a-39a.

In November of 2003 Neenah began the process of reevaluating Joel as required by law. *Id.* at 40a. Neenah assembled an evaluation team. *Id.* On February 26, 2004, Neenah held the first of three meetings relating to Joel's reevaluation. *Id.* at 41a. The purpose of the meeting was to review existing data and determine the need for additional testing or other evaluation materials. *Id.* The team decided to conduct additional testing to determine whether Joel continued to meet the educational criteria for other health impaired ("OHI"), autism, and emotional behavioral disabilities ("EBD"), although the parents did not agree with the EBD evaluation. *Id.* at 41a. The team also determined that it would send three team members to Chicago to the SSOS to conduct observations, meet with Joel, and obtain information from SSOS as part of the reevaluation. *Id.*

On March 12, 2004, three team members visited SSOS: the case manager who was a school psychologist, an occupational therapist and the autism resource teacher. *Id.* at 43a. By the date of their visit, Joel had

attended SSOS for about two months. *Id.* at 38a, 42a. Two of the teachers observed Joel in an environmental science class at SSOS, and confirmed with the teacher that Joel's behavior that day was fairly typical. *Id.* at 38a. The team interviewed two pairs of staff members, one from the residential portion of the facility and one from the educational portion of the facility. *Id.* at 43a. All three Neenah employees met with Joel and attempted to talk with him to gather certain information, including the completion of certain documents. *Id.* at 42a. Neenah's autism resource teacher provided Joel's teacher and a residence counselor surveys to complete relating to Asperger Syndrome. *Id.* at 42a-43a.

The second meeting was held on March 17, 2004. *Id.* at 44a. By consensus reached at that meeting, Joel was evaluated as meeting the criteria for autism and OHI. *Id.* at 45a. While the team's consensus was that Joel met the criteria for EBD, the parents voiced strong disagreement with this conclusion and as a result Neenah chose not to identify EBD as an additional disability. *Id.* at 45a.

The IEP team reconvened on April 22, 2004, for purposes of formulating Joel's IEP. *Id.* at 47a. Gail Hjortness attended, accompanied by her attorney. *Id.* Eric Hjortness did not attend the meeting. *Id.* The team included the Neenah's special education director, two regular education teachers, two special education teachers, two guidance counselors, an OHI consultant from the regional district, and the three persons who had visited SSOS. *Id.*

Neenah's special education director served as the LEA representative and led the discussion at the meeting. *Id.* Gail Hjortness made an audio recording of the meeting, which recording is approximately two hours and twelve minutes long, but does not capture the final 10 to 15 minutes of the meeting. *Id.* Thus, the meeting was almost 2 ½ hours long. *Id.*

The goals and objectives were discussed in general terms during the meeting. *Id.* at 48a; *Id.* at 18a ("After discussing Joel's strength's and weaknesses, the parties proceeded to discuss, in general terms, goals and short-term objectives for Joel's education.") However, according to the ALJ, the "specifics" of some of the goals and objectives were not discussed at the IEP meeting, although the discussion provided information from which to develop appropriate goals and short term objectives. *Id.* at 48a. The reason for this was explained well by the District Court:

> On several occasions in the course of the two-and-a-half hour meeting, members of the team attempted to focus on the task of setting specific goals and objectives. Joel's mother, along with her attorney, was part of that process and was specifically asked for her input. Rather than suggest goals and short-term objective she wanted included in the IEP, Joel's mother made clear to the team that she did not believe the District could provide her son an appropriate education. In her view, "the issue on the table [was whether the District would] pay for him to be at Sonia Shankman where he needs to be . . . ."

> (Exh. C, Disk #2, Track 5.) Despite her view that the District was unable to meet her son's needs, the team continued to discuss the efforts it was willing to undertake in order to provide Joel an appropriate education. They offered to revisit the IEP once the anticipated evaluation from SSOS was received or if problems surfaced in the course of the year. They also offered to meet with the Parents to discuss any changes they thought appropriate. Moreover, upon receipt of the completed IEP, Joel's mother did not complain that the goals and short-term objectives had not been adequately discussed or request additional ones be added. Her cryptic letter simply stated that "the IEP you proposed does not address the concerns we have repeatedly raised." (Ex. 577) She asked the District to reconsider placement at SSOS and stated that if the District was unwilling to modify the IEP and address "the concerns we have previously raised," she would look elsewhere, including SSOS for placement of her son.

Id. at 29a.

The IEP team determined that Joel needed instruction in a small group setting. *Id.* at 48a. The LEA representative said that Joel could receive instruction from special education teachers teaching the core subjects in a small group setting with regular education students. *Id.* at 48a-49a. The IEP team discussed whether Neenah had the financial resources to construct the small group classes with regular education

students at the Neenah High School, and IEP team agreed that Neenah could provide such a placement for Joel. *Id.* at 49a. Mrs. Hjortness asked the team to consider placing Joel at SSOS, and went so far as to define the ultimate issue for the IEP team to be whether Neenah would pay for Joel to attend SSOS under the IEP being developed. *Id.* at 50a. The IEP team did not formally consider the SSOS placement because the team felt that the specially designed program that they discussed and agreed-upon would meet his needs, and because such placement was in a less restrictive environment than SSOS and therefore by law was the required placement. *Id.*

The parents formally rejected Neenah's placement offer on May 4, 2004. *Id.* Despite already having rejected the placement offer on May 4, 2004, the parents sent the LEA representative a letter dated May 6, 2004, stating in relevant part:

> The IEP you proposed does not address the concerns that we have repeatedly raised. Before asking us to approve or disapprove of this placement, we would like you to reconsider placement at [SSOS]. We don't think you fairly considered this placement at the last IEP meeting on April 22, 2004.

Id.

B. PROCEDURAL BACKGROUND

On June 18, 2004, the parents filed a due process hearing request against Neenah seeking reimbursement for the cost of Joel's placement at SSOS, including the cost of transportation. The parents alleged that Neenah deprived Joel of FAPE relating to Joel's IEP dated April 22, 2004.

After a five day hearing, the ALJ issued a decision dated May 6, 2005. The ALJ found that Neenah complied with the IDEA by providing Joel with an IEP that was reasonably calculated to provide him with meaningful educational benefit. ALJ Coleman concluded, however, that Neenah committed a procedural violation of the IDEA. As a result of the alleged procedural violation, the ALJ ordered Neenah to reimburse the parents $26,788.32 for the cost of the parents' unilateral private school placement of Joel.

Neenah filed an appeal to the United Stated District Court for the Eastern District of Wisconsin of the ALJ's decision finding a procedural violation of the IDEA. The parents filed an appeal to the United Stated District Court for the Eastern District of Wisconsin of the ALJ's decision finding that Neenah complied with the IDEA by providing Joel with an IEP that provided him with a FAPE. The two appeals were consolidated. Neenah filed a Motion for Summary Judgment. The parents filed a Motion for Judgment on the Record. No additional evidence was presented to the District Court.

By Decision and Order dated June 27, 2006, the Honorable William C. Griesbach, United States District

Judge for the Eastern District of Wisconsin, granted Neenah's Motion for Summary Judgment and reversed that portion of the ALJ's decision finding that Neenah committed a procedural violation of the IDEA. Judge Griesbach denied the parents' Motion for Judgment on the Record, and as a result denied their request for reimbursement of the costs of the private school tuition and related expenses.

On appeal, the Seventh Circuit affirmed. The parents filed a petition for rehearing en banc, which petition was denied.

Petitioners filed a Petition for Writ of Certiorari.[1] In their Petition, Petitioners do not challenge the lower courts' decisions that the IEP developed for Joel was substantively appropriate and, if it had been implemented, would have provided Joel with FAPE. In the lower courts, the parents raised numerous procedural challenges, all of which the lower courts rejected. In their Petition, the Petitioners only challenge one claimed procedural violation relating to their claim that Neenah predetermined placement of Joel in the public school before the IEP meeting.

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[1] While two amicus parties filed Motions for leave to file an amicus brief in support of the Petition, neither motion raised any relevant issues or law that were not addressed in the Petition. The amicus Motions do not bring to the Court's attention relevant matter not already raised by the Petitioners, as required by Supreme Court Rule 37.

REASONS FOR DENYING THE PETITION

Petitioners inflate this case into one presenting "a fundamentally important question of federal education law . . ." presenting a "conflict[] with the clear holdings of other circuits." Pet. at 2, 3. On the contrary, the Seventh Circuit concluded that in this particular case the parents were not meaningfully denied an opportunity to participate in the formulation of the IEP such that Joel was denied a FAPE. Contrary to Petitioners' suggestion, the Seventh Circuit did not decide that Neenah predetermined Joel's placement. In fact, there is no credible evidence in the record to establish that Neenah predetermined Joel's placement, which is a decision that the District Court and Seventh Circuit reviewed de novo of the ALJ's decision. Thus, the Seventh Circuit's decision does not conflict with any other Circuits' decisions.

Even assuming the existence of a conflict between the Seventh Circuit's decision and decision of any other Circuit, such conflict is simply not relevant to this case because Neenah did not predetermined Joel's placement at the public school.

Finally, granting the Petition would have no impact on the outcome of this case, since Neenah did not predetermine placement and the parents' utter refusal to participate in the process, rather than Respondent's failure to allow them to participate, that created their lack of participation in the formulation of the IEP.

I. Review Of The Seventh Circuit's Decision Is Not Warranted Because The Petition Relies On A False Premise – Namely That The Seventh Circuit Somehow Sanctioned Predetermination

Contrary to Petitioner's argument, the Seventh Circuit did not conclude that it is appropriate to predetermine a student's placement. Even the dissent to the petition for rehearing en banc recognized that the panel majority may not have gone as far as Petitioners suggest: "The panel majority *appears* to have *assumed* the ALJ's finding that predetermination had occurred . . . ." Pet. at 78a, n.1 (emphasis added).

Contrary to the dissent's characterization of the panel's decision, the Seventh Circuit never explicitly or implicitly decided that Neenah predetermined placement. In fact, the exact opposite is true. This conclusion is inescapable after reviewing the ALJ's rationale for his conclusion of predetermination, and the lower courts' rejection of that rationale.

The ALJ concluded that Neenah predetermined placement because it did not consider the parents' demand that Joel be educated in private school once it determined that Joel could be educated in a far less restrictive environment – a regular education classroom in the public school.

Consistent with decisions from other courts, both the District County and the Seventh Circuit held that Neenah was not required to consider the private

placement having determined that a public placement was appropriate. As the Seventh Circuit explained:

> Finally, we turn to the appellants' main challenge - that the school district denied Joel a free appropriate public education because it predetermined Joel's placement. The ALJ found that the school district made its decision to place Joel in public school before the IEP was written. However, the IDEA requires that the school district educate Joel with his nondisabled peers to the "greatest extent appropriate." 20 U.S.C. § 1412(a)(5)(A). Recognizing that we owe great deference to the ALJ's factual findings, we find that the IDEA actually required that the school district assume public placement for Joel. Thus, the school district did not need to consider private placement once it determined that public placement was appropriate.

Pet. App. at 10a. This is the entire portion of the Seventh Circuit's opinion relating to Petitioners' claim of predetermination. The Seventh Circuit did not sanction predetermination; it rejected the ALJ's reasoning supporting his conclusion of predetermination.

The Seventh Circuit's reasoning was analogous to the District Court's analysis of the predetermination issue:

> The question, however, is whether such inadequacies are present in this case. ALJ

Coleman found that they were in two respects – first, the District's arguably premature determination of Joel's placement, and second, the District's failure to reconvene the IEP team after it formulated the goals and objectives outside the presence of the Parents. With respect to the former supposed inadequacy, the court cannot reconcile ALJ Coleman's ruling with his other findings and with the requirements of the IDEA. The IDEA required the District to mainstream Joel to the maximum extent appropriate:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A). Pursuant to this provision, the District "must ensure that '[Joel] is educated in the school that he . . . would attend if nondisabled' unless [Joel's] educational program 'requires some other

arrangement.'" *Casey K. ex rel. Norman K. v. St. Anne Community High School Dist. No. 302*, 400 F.3d 508, 512 (7th Cir. 2005) (quoting 34 C.F.R. § 300.552). In other words, the District had no obligation to consider placing Joel at SSOS unless and until it concluded that he could not receive a free and appropriate public education in district schools. *See* 20 U.S.C. § 1412(a)(10)(C)(i) ("[T]his subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility."); *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C. Cir. 1991) ("[I]f there is an appropriate public school program available, i.e., one reasonably calculated to enable the child to receive educational benefits, the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child. . . . In short, the inquiry as to the appropriateness of the State's program is not comparative.") (internal quotation marks and citations omitted). The District determined, and the ALJ found, that Joel could receive a free and appropriate public education in district schools. (Decision at 22.) Having so concluded, the District was entitled to draft an IEP that assumed Joel would be educated in the

> District's schools, and was not required to consider placement at SSOS. *Hampton Sch. Dist. v. Dobrowolski*, 976 F.2d 48, 54 (1st Cir. 1992) (holding that determining placement before drafting of IEP did not violate IDEA).

Pet. App. at 26a-28a.

Thus, both the District Court and the Seventh Circuit rejected the reasoning underlying the ALJ's conclusion of predetermination. The Seventh Circuit did not determine that predetermination occurred. It did not determine that despite predetermination, there was no procedural violation. It rejected the rationale for the ALJ's conclusion of predetermination. Therefore, the Seventh Circuit implicitly found no predetermination.

Moreover, the Seventh Circuit found that while it may have been the case that the goals and objectives "never got beyond 'general terms'," Pet. at 28a, the Seventh Circuit found that there was no credible evidence to conclude that discussing the concepts in general terms deprived the parents of a meaningful opportunity to participate in the process of formulating the IEP such that Joel was denied a FAPE. Pet. at 29a. Similarly, the District Court found that the evidence established it was not Neenah that deprived the parents of the ability to participate; rather it was the parents who refused to participate in any discussion other than their desire for Joel to be placed at SSOS. Pet. App. at 31a.

In short, the Seventh Circuit rejected the only reasons offered by the ALJ for his conclusion that

Neenah predetermined placement. Having rejected the rationale, the only reasonable conclusion to draw is that the Seventh Circuit rejected the predetermination decision. Certainly, the decision cannot be cited for the exact opposite proposition – that predetermination is acceptable.

Petitioners rely on the dissent's suggestion that the majority "appears" to have "assumed" predetermination. This was the dissent's characterization of the majority's opinion. Nowhere in the majority's decision does the Seventh Circuit state that Neenah predetermined placement and despite such predetermination, Neenah did not violate the IDEA. This Court should not accept review of an "assumed" holding that is contrary to the reasonable reading of the Seventh Circuit's decision.

This case simply does not provide the vehicle of the Court to review whether predetermination always amounts to a procedural violation. The Seventh Circuit did not find predetermination, and instead found that the parents were not denied a meaningful opportunity to participate in the formulation of Joel's IEP. The Seventh Circuit's decision does not merit review by this Court.

II. Review By This Court Of The Seventh Circuit's Decision Is Not Warranted Because Neenah Did Not Predetermine Joel's Placement At The Public School.

Predetermination amounts "to a procedural violation of the IDEA." *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 857 (6th Cir. 2004). It can cause substantive harm, and therefore deprive a child of FAPE, where parents are "effectively deprived" of "meaningful participation in the IEP process." *Id.*

Predetermination is not synonymous with preparation. *Nack ex rel. Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 610 (6th Cir. 2006). Federal law "prohibits a completed IEP from being presented at the IEP Team meeting or being otherwise forced on the parents, but states that school evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions." *Id.*, citing *Ms. C. ex rel. N.L. v. Knox County Sch.*, 315 F.3d 688, 694 (6th Cir. 2003); 34 C.F.R. 300, App. A, No. 32. In *Knox County Schools*, the court emphasized that school officials are permitted to form opinions and compile reports prior to IEP meetings. *Knox County Sch.*, 315 F.3d at 693-94 n.3. The court found that forming opinions before the IEP meeting is harmless as long as school officials are "willing to listen to the parents." *Id.* at 694-95.

The decision as to whether a school district engaged in predetermination is a question that the court reviews

de novo, since it is a mixed question of law and fact. *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 766 (6th Cir. 2001).

In *Spielberg ex rel. Spielberg v. Henrico County Public Schools*, 853 F.2d 256 (4th Cir. 1988), the school district decided to change the student's placement before drafting the IEP. The Fourth Circuit found that a procedural violation occurred because the placement had been predetermined. In *Deal*, 392 F.3d at 858, the Sixth Circuit found predetermination where (1) the school district committed numerous procedural and substantive errors, (2) the school district had an unofficial policy of refusing to consider certain programs regardless of the child's needs, and (3) that the district's main concern was financial. *See Winkelman v. Parema City Sch. Dist.*, 411 F. Supp. 2d 722, 728-29 (N.D. Ohio 2005). Indeed, in *Deal*, the parents were not even allowed to ask questions during the IEP meetings. *Id.*

In far more cases, however, courts have declined to find predetermination. For example, in *Knox County Sch.*, 315 F.3d at 694-95, the court found no predetermination where the parent was not involved in the initial, ex parte determination of eligibility but was an active participant in the final determination. In *Fuhrmann ex rel. Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1036 (3d Cir. 1993), the court found that the parents had an opportunity to participate in formulating the IEP in a meaningful way. In *Hanson ex rel. Hanson v. Smith*, 212 F. Supp. 2d 474, 486 (D. Md. 2002), the court found credible evidence that school board came to the IEP meetings with an open mind, and that several options were discussed and considered

before a final recommendation was made. In *Doyle v. Arlington County Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992), *aff'd*, 39 F.3d 1176 (4th Cir. 1994), the court held that the school had merely proposed a placement before the IEP meeting was completed and had not "fully made up its mind before the parents ever [got] involved," thereby denying the parents "the opportunity for meaningful input." In *Schoenback v. District of Columbia*, 2006 WL 1663426, *5 (D.D.C. 2006), the court found no predetermination where the teacher's research of potential placements before the IEP meeting demonstrated only that the teacher was doing her job, not that the district predetermined the student's placement.

In *Nack*, 454 F.3d 604, the Sixth Circuit found insufficient evidence to find predetermination where the parent was given many opportunities to comment on the IEP and the school district took her comments seriously. Like in this case, in *Nack*, there were three separate IEP meetings, the parent actively participated in each of these meetings and the parent repeatedly made school officials aware of her disapproval of the student's program and her desire for the student to remain in the regular education setting.

In this case, the ALJ concluded that a preponderance of the evidence, "though entirely circumstantial," suggested that Neenah entered the IEP meeting having made up its mind as to Joel's placement under whatever IEP was developed at the meeting. Pet. App. at 66a. The ALJ offered two reasons for his conclusion of predetermination. *Id.* First, he determined that because the goals and objectives were

not formulated at the meeting, the IEP team's consideration of placement was premature. *Id.* Second, he relied on the fact that Neenah did not give serious consideration to the parents' requested placement at SSOS. *Id.* at 66a-67a. As both the District Court and Seventh Circuit found, the ALJ's reasoning is in error, and therefore his conclusion is as well.

As to the first reason offered by the ALJ, as the District Court and Seventh Circuit correctly found, the IEP team *did* discuss goals and objectives at the IEP team meeting, and therefore it was not in error to discuss placement at the meeting. As the District Court found, "[a]fter discussing Joel's strength's and weaknesses, the parties proceeded to discuss, in general terms, goals and short-term objectives for Joel's education." Pet. App. 18a. While Neenah did not write out the IEP at the meeting, the law does not require that it do so. *See Hampton Sch. Dist. v. Dobrowolski*, 976 F.2d 48, 54 (1st Cir. 1992).

Further, as both the lower courts found, not only did Mrs. Hjortness and her attorney not object to the alleged lack of sufficiently detailed discussion about goals and objectives either during or even after the meeting, it was abundantly clear from her own tape recording that Mrs. Hjortness had absolutely no interest in discussing specific goals or objectives. The record is clear that Mrs. Hjortness did not want to talk about goals and objections. She had only one goal on her mind: placement at SSOS.

As the District Court correctly found, it is one thing to say that Neenah should have reconvened the IEP

meeting to further discuss goals and objectives; it is quite another to conclude that the parents were denied the opportunity to meaningfully participate in the formulation of the IEP. The IEP team tried to focus on goals and objectives, and unfortunately that was not Mrs. Hjortness's focus. Mrs. Hjortness expressed her view that under no circumstances could Neenah provide Joel with a FAPE in the public school setting. Despite her view, the IEP team continued to discuss Joel's needs. Neenah offered to reconvene the IEP team at least four times, and offered to review the data from SSOS when it became available at least six times during the meeting. When the parents objected to the placement offer, not once did they mention anything about being denied a right to participate in the formulation of Joel's IEP, including the goals and objectives. Their letter is telling: the only thing they complained about is the placement.

The second and final rationale offered by the ALJ to support his conclusion of predetermination was that Neenah refused to consider the parents' requested placement at SSOS having concluded that Neenah could provide Joel with FAPE not only in the public school, but in a specially designed class with regular education students. As both of the lower courts correctly found, the presumption of least restrictive environment as required by the IDEA means that if a public school placement is appropriate, a school district *need not consider a private placement*, even one preferred by the parents. *Schoenbach v. District of Columbia*, 309 F. Supp. 2d 71, 80 (D.D.C. 2004); *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C. Cir. 1991); *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*,

931 F. Supp. 474, 479 (S.D. Tex. 1996); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992-93 (1st Cir. 1990).

This makes perfect sense. School districts are charged under IDEA with formulating an IEP that provides FAPE to a student in the least restrictive environment. *See Oberti v. Board of Educ. of the Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1214 (3d Cir. 1993). If a school district can provide FAPE within the public school setting, then by definition such a placement is less restrictive than a residential setting. The parents focus on SSOS for Joel's placement ran directly contrary to the IDEA's presumption of least restrictive environment. Neenah appropriately chose to focus on developing an IEP that would provide Joel with FAPE in the least restrictive environment. While Mrs. Hjortness wanted the IEP meeting to focus on whether Neenah would pay for Joel's placement at SSOS, Neenah was charged by law with providing Joel with FAPE in the least restrictive environment. Once the team determined that could be done in the public school, consideration of a private placement was pointless.

Accordingly, the fact that Neenah did not formally consider Joel's placement at SSOS is <u>not</u> evidence Neenah made up its mind about placement before the meeting. The law simply did not require Neenah to consider SSOS once the IEP team determined that Joel could be educated at Neenah in a far less restrictive environment than a residential placement.

Both the District Court and the Seventh Circuit correctly found the two reasons offered by the ALJ for

his conclusion of predetermination were not valid. Both of the lower courts correctly determined that the parents' procedural rights were not violated because there was no procedural violation and because there was absolutely no harm to the parents in light of their one and only goal in the entire IEP process. The lower courts' decisions are correct, are not contrary to any other Circuit's decision, and present no fundamentally important issue warranting review by this Court.

III. Even If A Circuit Conflict Exists, This Case Presents A Poor Vehicle For Resolving It.

Even where a clear conflict exists among Circuits, certiorari may be denied where resolution of the conflict would be irrelevant to the outcome of the case. Gressman, Geller et. al., SUPREME COURT PRACTICE, 248 (9th ed. 2007), *citing Sommerville v. United States*, 376 U.S. 909 (1964).

Lower courts have made predetermination decisions in a variety of factual circumstances. By assuming the Seventh Circuit found predetermination, the Petitioners elevate the Seventh Circuit's decision as creating a split among the Circuits. Even if the Seventh Circuit decision created a split among the Circuits (which it does not), this case does not provide the Court with a vehicle with which to address it.

First, as the evidence outlined above makes clear, no predetermination was made in this case. Therefore, even if the Court accepted the Petition, the outcome would be no different to the Petitioners.

Second, the record is clear that it was the parents' utter refusal to participate in the process (other than demanding the placement they wanted), rather than Neenah's failure to allow them to participate, that created their lack of participation in the formulation of the IEP. As the Seventh Circuit explained:

> Considerable time was spent in multiple IEP conferences at which Joel's parents and their advocate participated. At several times during these conferences, the team attempted to set specific goals and objectives, but the Hjortnesses insisted that "the issue on the table [was whether the school district would] pay for [Joel] to be at Sonia Shankman where he needs to be." The school district arguably should have held a second IEP meeting to review the goals and objectives that were not discussed at the meeting. However, this procedural violation does not rise to the level of a denial of a free appropriate public education. The record does not support a finding that Joel's parents' rights were in any meaningful way infringed.
>
> We note that this determination in no way contravenes our decision in *Ross*. In *Ross*, the parents of a girl with Rett syndrome [footnote omitted] alleged, inter alia, that they were denied a meaningful opportunity to participate in the modification of their daughter's IEP, which constituted a procedural violation of the IDEA. 486 F.3d at 274. The *Ross* Court affirmed the district

court's holding that the parents did in fact have a meaningful opportunity to participate in the comprehensive review of their daughter's situation and IEP, referencing a 32-page conference summary report of the seminal meeting at which they participated. *Id.* at 275. The consensus reached at the end of that meeting was to change the girl's placement; a decision that the girl's parents opposed. *Id.* However, the Court held that just because the placement was contrary to the parents' wishes, it does not follow that the parents did not have an active and meaningful role in the modification of their daughter's IEP, as required by the IDEA. *See id.* at 274-75.

In this case, it is not that Joel's parents were denied the opportunity to actively and meaningfully participate in the development of Joel's IEP; it was that they chose not to avail themselves of it. Instead of actively and meaningfully participating in the discussions at multiple IEP meetings, the Hjortnesses refused to talk about anything other than "[whether the school district would] pay for [Joel] to be at Sonia Shankman where he needs to be." As a result, the school district was left with no choice but to devise a plan without the meaningful input of Joel's parents. Under these circumstances, the parents' intransigence to block an IEP that yields a result contrary to the one they seek does not amount to a violation of the

> procedural requirements of the IDEA. To hold otherwise would allow parents to hold school districts hostage during the IEP meetings until the IEP yields the placement determination they desire.
>
> . . .

Pet. App. at 7a-9a. (Emphasis added.)

The Seventh Circuit decision exemplifies why this is not a good case to resolve any alleged split in the Circuits. When parents refuse to participate in the formulation of an IEP, a school district is still bound to develop an IEP and placement offer. In this case, Neenah had no choice but to proceed. There is only one conclusion that can be drawn from the record in this case: the parents did not want to participate in the process. They wanted one and only one thing: placement of Joel at SSOS. For the parents to now complain about lack of participation in the formulation of goals and objectives when they refused to participate in the process of formulating the goals and objections renders this case a very poor vehicle for resolving any alleged Circuit conflict.

CONCLUSION

Petitioners have not established any compelling reason for this Court to grant the Petition. For the foregoing reasons, Respondent respectfully requests the Petition be denied.

Respectfully submitted,

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